

ELSIE BHILA
versus
THE MASTER OF HIGH COURT
and
FREDDY CHMBARI NO
and
RATIDZO BHILA
and
KELVIN BHILA
and
KWATINI BHILA

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 20 January 2015 & 28 May 2015

Opposed application

Miss *R Venge*, for the applicant
C Mucheche, for the respondent

MWAYERA J: This is an application to set aside the first respondent's (the Master of High Court) direction wherein the Master allowed the third to fifth respondents to inherit from the estate of late Hoyini Hilary Komati Bhila. The bone of contention being that the third to fifth respondents were born out of wedlock.

The brief background of the matter is that the applicant was married civilly to the late Hillary Hoyini Komati Bhila. The marriage was blessed with four children. In 1999 the applicant's husband Hillary Hoyini Komati Bhila passed on prompting the registration of the deceased estate. The applicant as surviving spouse was appointed the executrix of the estate. At the time of the death of her husband the applicant and her late husband were staying at 1247 Ardbennie Township also known as 1247 Mukuvisi Road Houghton Park. Upon processing the estate the applicant who had advertised the estate got to know that her late husband had 3 children born out of wedlock, that is third-fifth respondents. The 3 children or their guardians then sought to inherit from their late father's estate. It was then that the first respondent appointed a neutral executor, the second respondent. The second respondent

subsequently prepared a distribution plan wherein the Houghton Park property was treated as matrimonial property and awarded to the applicant as the surviving spouse.

The rest of the property which included a Borrowdale house was then treated as free residue of the estate. Irked by this distribution plan the applicant raised an objection with the first respondent. The first respondent directed that the distribution plan as given by the second respondent be advertised. It is these directions by the Master (first respondent) which the applicant wishes set aside.

The applicant argued all the property is under the umbrella of matrimonial estate and that during the subsistence of the marriage she was gainfully employed and contributed to the estate even though the properties were not registered in her name given the prevailing legal situation then, prior to the legal age of majority which emancipated women to own property. She further argued that the third-fifth respondents are precluded from inheriting *ab intestato* because they are children born out of wedlock.

In summary issues which fall for determination in circumstances of this case can be outlined as follows:

1. Whether or not children born out of wedlock can inherit *ab intestato* from the estate of their father.
2. Whether or not the Borrowdale house falls within the free residue of the estate of the late Hillary Hoyini Komati Bhila.
3. Whether or not the first respondent's directions should be set aside.

It is not in dispute that the deceased died intestate. The legislative in roads on administration of estates cannot be ignored in dealing with the present application. The legal position which is fairly settled on inheritance will be of guidance and equally the supreme law of the country the Constitution of Zimbabwe Amendment 20 Act 2013, international provisions and case law will be of assistance in determination of issues at hand.

Section 3A of the Deceased Estate Succession Act [*Chapter 6:02*] deals with **inheritance of matrimonial home and household effects:**

- “The surviving spouse of very person who, on or after the first November 1997, dies wholly or partly intestate shall be entitled to receive from the free residue of the estate-
- (a) The house or other domestic premises in which the spouses or the surviving spouse, as the case maybe, lived immediately before the person's death; and
 - (b) The house hold goods and effects which immediately before the person's death, were used in relation to the house on domestic premises referred to in paragraph (a) where such house premises goods and effects form part of the deceased person' estate”.

The applicant as surviving spouse was, in compliance with the Deceased Estate Succession Act given as entitled to the matrimonial home goods and effects in Houghton Park where she and her husband were staying at the time of his death.

The remaining estate falls in the basket of free residue to be determined again in terms of the law.

Section 3 of the Act clearly spells out entitlement of a spouse of a deceased who dies intestate. The section in specifying the entitlement of a surviving spouse also outlines entitlement of descendants and parents, brother or sister. The use of the word descendant together with parent, brother or sister in the relevant statutory provision cannot be given a blind eye. The argument by the applicant that a descendant is not defined therein is simply to distort the legislative intention. The question that begs of answer with that line of argument is why the applicant seeks to confine the argument of definition to descendent only and not extend it to parent, brother and or sister, for they are equally not defined in the Act.

A descendant is defined in the *Oxford Dictionary Thesaurus and Word Power Guide Indian Edition* as “child, heir, scion, successor, family issue, offspring posterity, and progeny”.

A descendant by no means excludes a child by virtue of status of marriage. It is my considered view that a child whether born out or in wedlock is one’s child and thus descendent.

In outlining the entitlement of a spouse and specifically mentioning the situation which will prevail where there is no descendent the legislature clearly recognised entitlement of both surviving spouse and descendants. Section 3 reads:

“Subject to section four, the surviving spouse of every person who, on or after 1st April, 1977 dies either wholly or partly intestate is hereby declared to be an intestate heir of the deceased’s estate according to the following rules

- (a) If the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall-
 - (i) be entitled to receive from the free residue of the joint estate, as his or her sole property, the household goods and effects in such estate:
 - (ii) succeed in respect of the remaining free residue of the deceased spouse’s share of the joint estate to the extent of a child’s share or to so much as, together with the surviving spouse’s share in the joint estate, does not exceed the specified amount which ever is the greater:
- (b) If the spouses were married out of community of property and the deceased’s spouse leaves any descendant who is entitled to succeed *abintestato*, the surviving spouse of such person shall-
 - (i) be entitled to received from the free residue of the deceased spouse’s estate, as his or her sole property the household goods and effects and such estate;

- (ii) succeed in respect of the remaining free residue of the deceased spouse's estate to the extent of a child's share or to so much as does not exceed the specified amount which ever of greater:
- (c) If the spouses were married in or out of community of property and the deceased spouse leaved no descendant who is entitled to succeed *abintestato* but leaves a parent or brother or sister, whether of the full or half blood, who is entitled to succeed the surviving spouse shall-
 - (i) Be entitled to receive from free residue of the joint estate or the deceased spouses estate, as the case may be, as his or her sole property, the household goods and effects in such estate:
 - (ii) Succeed in respect of the remaining free residues of the deceased spouse's share of the joint estate or the deceased spouse's estate, as the case may be, to the extent of a half share or to so much as does not exceed the specified amount whichever is greater
- (d) In any case not covered by paragraph (a), (b) or (c), the surviving spouse shall be the sole intestate heir."

A reading of these provisions clearly map way for sharing of property in situations where there are surviving spouse, descendants, parents, brother and or sister.

There is no insinuation in the legislative provisions that reveals where the deceased dies living descendants they ought to be excluded from inheriting a share of the free residue on basis of being illegitimate.

The common law position of excluding children born out of wedlock violated the constitutional rights to protection of the law and freedom from discrimination. These rights have always been in the Zimbabwean Constitution the old Act 1979 and have been more pronounced by the wording in the new Act, The Constitution of Zimbabwe Amendment (No. 20) Act 2013.

I propose to revisit the constitutional provisions after a brief discussion of the Deceased Estate Succession Act [*Chapter 6:02*]. Section 10 is to the effect that nothing in Part (III) shall affect or alter the laws of Zimbabwe regarding inheritance *ab intestato*.

The question is what is the law as regards inheritance *ab intestato*. The Constitution is the supreme law of the country s 2 thereof reads:

- " (1) This Constitution is the supreme law of Zimbabwe and any law, practices custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
- (2) The obligations imposed by this constitution are binding on every person, natural or juristic including the state and all excutive, legislative and judicial institutions and agencies of government at every level and must be fulfilled by them."

The Master is duty bound to apply the law as espoused by the law giver. In the present case the Master, the first respondent accepted registration of the late estate Hillary Hoyini Komani Bhila who during his lifetime was married in monogamous type of marriage

to the applicant. The first respondent appointed the applicant as an executor. Upon being given information which is not in dispute that the applicant's late husband had sired three children (third to fifth respondent) out of wedlock the first respondent procedurally appointed a neutral executor dative the second respondent. The second respondent in the process of distribution plan attainment included the three respondents. The estate has not been wound up given the common cause facts. There is no basis for arguing that the constitution is not applicable as this is viewed by the applicant as retrospective application of the law. The constitution of Zimbabwe has always been the supreme law and applicable further in this case the estate has not been wound up. The Provisions of the constitution had immediate application as law on the date the constitution became law.

The first respondent's directions do not only conform with the Deceased Estate Succession Act in so far as it provides for descendants but his directions also resonate with the constitution in so far as the law should not discriminate. I find solace in the remarks expressed in the case of *Smyth v Ushewokunze and Anor* 1997 (2) ZLR 544 wherein the court expressed the view that the provisions of the constitution must be given a purposive interpretation so as not to strangle the right that is being protected. To seek to discriminate the third to fifth respondents on basis of them being children born out of wedlock would not only be unfair and unjust but undemocratic for it would amount to punishing innocent children in an inhuman manner for an iniquity beyond their control. An "iniquity" by those who sired them at no request by the said children let alone their consultative in put, would surely be discrimination which no civilised democracy would legally sanction

In the Zimbabwean context the question **whether** or not children born out of wedlock can inherit *ab intestato* from the estate of their father; is ably answered by provisions of the Constitution of Zimbabwe Amendment (N.O. 20) Act 2013 section 56 (3)) provides:

"Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status or **whether they were born in or out of wedlock.**"

A reading of this section clearly outlaws discrimination on basis of being born out of wedlock. The third to fifth respondents have a right to equality and non-discrimination. The constitution itself actually regulates its application and interpretation. Section 44 reads:

“The state and every person, including juristic persons and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this chapter”.

It accordingly follows that the declaration of Rights as given in Chapter 4 must be given full effect so as not to distort the purpose of the law maker in protecting the right in question. It would therefore follow that discrimination occasioned on basis of being born out of wedlock to exclude children or descendants of a deceased from inheriting from the estate of their father *ab intestato* is *ultra vires* the constitution. In *Edith Mayiwa v Master of the High Court and Anor* HH 278/11 Gowora J as she then was outlined an interesting debate on the common law position wherein children born out of wedlock were excluded from inheriting from their father’s estate when it was remarked that would be in violation of constitutional right to protection of the law, freedom from discrimination and to privacy. The constitution referred to then is the one repealed and replaced by the current constitution. The current constitution outlaws any sort of discrimination against children on basis that they are born in or out of wedlock. The law is not static but dynamic going along with economic social and cultural values. If the law is construed in a narrow sense negating the social values on which the constitution which is the supreme law is anchored on then the law will not resonate with what is reasonable. It will cease to serve the purpose for which it is enacted and society will not have respect for the law thus leading to lawlessness and anarch.

In the present case one cannot give a blind eye to the values of the constitution in seeking to bridge the gap between children born in and out of wedlock.

The reasoning where children born out of wedlock were viewed as “devils, bastard illegitimate” is unacceptable and has been overtaken by dynamics in culture society and legal development. I subscribed to the sentiments echoed in *ZIMNAT Insurance Company Pvt Ltd v Chawanda* 1990(2) ZLR 145 (S) wherein it was held:

“If the law is to be a living force it must be dynamic and accommodating to change. It must adapt to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs and is not based on human necessities and experiences of the actual affairs of men rather than a philosophical notion it will one day be cast off by the people because it will cease to serve any useful purpose”.

The constitutional provisions outlawing discrimination on basis of being born out of wedlock find support in international conventions and indeed reflect progressive development of the law in response to social and cultural development.

Children's rights as outlined in the convention on Rights of the Child Articles and The African Charter on the Rights and welfare of The Child Article 3 and 4 emphasise the best interest of the child being of primary importance and also emphasises the right to non-discrimination. Article 3 provides:

“Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this charter irrespective of the child's or his or her parents or legal guardian race, ethnic group, colour, sex language, religion political or other opinion, national and social origin, ... birth or other status.”. Clearly therefore discrimination on basis of maternity status is unacceptable.”

Social and legal dictates clearly show that no child should be punished by virtue of not having been sired in a registered union or marriage. It is not in dispute third-fifth respondents are the late Hillary Komati Bhila's children thus his descendants and beneficiaries to the estate.

The fifth respondent is a juvenile and again well protected by the law, s 81 of the constitution clearly spells out Rights of Children. Section 81(1)(a):

“Every child, that is to say every boy and girl under the age of eighteen years has the right to equal treatment before the law, including the right to be heard”. (underlining my emphasis).

Section 81(2):

“A child's best interests are paramount in every matter concerning the child and s 81(3) Children are entitled to adequate protection by the courts, in particular the High Court as their upper guardian”.

It is with this background and in particular s 81(3) that in the exercise of my discretion upon observing that there is no report by the curator accompanying the fifth respondent's opposition papers, the court held the view that as upper guardian of the minor child the best interest of the child would be best served by full ventilation into the matter. Moreso given that the natural mother and legal guardian of the minor one Mary Ncube deposed to an affidavit in opposition and that all the 3 children inclusive of the fifth respondent are legally represented by the same legal practitioner. There is no prejudice which will be occasioned given the best interest of the child are of paramount interest and that clearly from evidence the fifth respondent just like the third and fourth respondent cannot be discriminated against on basis of being born out of wedlock.

Turning now to whether or not the Borrowdale house falls within the free residue of the estate, from evidence filed it is not in dispute that immediately before the late Hillary Komati Bhila passed on he was staying with the applicant at their Houghton Park house.

Further it is common knowledge that both the Houghton Park and Borrowdale houses fall into the estate of the deceased since these properties were registered solely in the name of the deceased. There is no argument that the applicant is the surviving spouse and in compliance with the Deceased Estate Succession Act s 3A the applicant's entitlement to the Matrimonial home and household goods and effect is unquestionable. This then leaves the other property forming the estate for consideration. It is for this property that the first respondent gave a directive that the house in which the applicant was not immediately staying in at the time of death of her husband fell under free residue. This brings in the last issue of whether or not in the circumstances of this case the direction should be set aside for being in conflict with the legal position.

Section 3 and 3A sought to cure the mischief which was created in estates where spouses died intestate and relatives embarked on property grabbing. It is crystal clear from the Act that the matrimonial home which is the house in which the surviving spouse was residing in immediately before death of the spouse is inherited by the surviving spouse without debate. The applicant's matrimonial house or home per evidence is the Houghton Park house which she was allocated. The same Act in seeking the redress anomalies on inheritance *ab intestato* is clearly couched to show descendants, parents, brother or sisters get a share of the free residue while the spouse also gets a share over and above the matrimonial assets. The legislature made inroads giving guidance on sharing ratio to cater for situations where an individual would have died without a will. The constitution outlaws rules, conduct, practice and law which is discriminatory. Hence the third-fifth respondents as off spring/descendants/children/progeny albeit out of wedlock are also entitled to a share of the free residue just like the children/descendants or off springs born in wedlock. The first respondent directed for distribution plan to factor in the factual position of the additional three children. That cannot be viewed as a directive not based on existing law given the constitutional and legislative provisions. The applicant's husband died intestate and hence estate must be administered accordingly.

The recognition of one individual's rights has to be as much as practically possible upheld, while at the same time bearing in mind that the next person equally has rights that have to be upheld. It is in that process of seeking to balance all individual's rights that of necessity the rights of one do not necessarily retain the absolute status.

The surviving spouse is entitled to the matrimonial house plus goods and effects and in case of a civilly married spouse he or she is entitled to a share in the joint estate and further

share in free residue while descendants, parent, brothers or sisters are also entitled to a share in the free residue. In absence of all these descendants, parents, brother or sisters then the surviving spouse (Deceased Estate Succession Act) inherits as the sole intestate heir.

The first respondent's directive after appointment of a neutral executor was above board and in compliance with the laws of this country. Clearly children whether born in or out of wedlock are beneficiaries in the estate of their biological father or mother who would have died intestate. The application lacks merit and must fail.

Accordingly the application is dismissed with costs.

Mambosasa, applicant's legal practitioners

Matsikidze and Muccheche, 3rd-5th respondents' legal practitioners